1940

E. S. Wilson v. Weber County : Brief of Respondent

Utah Supreme Court

John A. Hendricks, Glenn W. Adams; attorneys for defendant, Weber County.

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

E. S. WILSON,

Plaintiff, Respondent
and Cross-Appellant.

vs.

WEBER COUNTY, a public corporation
of the State of Utah,

Defendant, Appellant
and Cross-Respondent.

No. 6195

APPEAL FROM THE SECOND JUDICIAL
DISTRICT COURT IN AND FOR
WEBER COUNTY, UTAH
Hon. Lewis V. Trueman, Judge

Brief of Appellant and Cross-Respondent

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Received .....copies of the above Brief
this .....day of November, 1940.

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Attorneys for Respondent

Index of Authorities

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APPELLANT'S REPLY BRIEF

The questions involved as set out in the cross-appellant's brief are:

1. Does respondent's complaint state facts sufficient in its "first cause of action," to constitute a cause of action against appellant?

(a) Is an allegation of payment of the moneys under protest necessary to complete a full allegation of said cause of action?

(b) Is it necessary to allege the presentation and rejection of a claim against Weber County pursuant to the provisions of Section 19-11-10, R. S. U. 1933?

2. Are respondent's second and third causes of action on their face barred by the provisions of Section 104-2-30 R. S. U. 1933?

(a) When does the period of limitation begin to run on respondent's causes of action?

(1) Is prior demand a necessary part of respondent's cause of action?

(2) If prior demand is a prerequisite to action, may a claimant indefinitely delay making demand?

(3) If the claimant may not indefinitely postpone the running of the statute by delaying demand, when will the period begin to run in the absence of a demand?

ARGUMENT

The appellant of this brief will not make an extended discussion of the first question as we consider that our brief on the appeal covered that.

As to the second and third causes of action involved, in Question 2, Subdivisions thereof, it may be assumed for the purpose of argument only that in these two causes of action the first question is not involved as we are particularly anxious to have a definite ruling as to both points of law, and that the consideration of them separately insures the separate rulings.

In order to have it definitely before the minds of the Court the complaint alleges that the payments were made to the Clerk of Said Court as follows:

Estate	*Date of Payment*
Maule's Estate	July 1, 1935
Scowcroft's Estate	August 27, 1931
Steven's Estate	April 4, 1933

It is alleged demands were made as follows; and the record discloses suit was filed in this Court to recover these sums from Weber County as aforesaid on April 4, 1939.

Estate	*Date of Demand*	*Date Suit Filed*	*Amount*
Maule's Estate	Sept. 1, 1938	April 4, 1939	$325.00
Scowcroft's Estate	Sept. 1, 1938	April 4, 1939	967.00
Steven's Estate	Mar. 6, 1939	April 4, 1939	65.00

It will, therefore, be noticed that the substantial elapsed time between the date of payment and the date of demand in each estate is as follows:

Estate	*Elapsed Time*
Maule's Estate	3 years, 2 months
Scowcroft's Estate	7 years, 4 days
Steven's Estate	5 years, 11 months, 2 days

And the substantial lapse of time between date of payment and date of suit filed is as follows:

Estate	*Elapsed Time*
Maule's Estate	3 years, 9 months, 3 days
Scowcroft's Estate	7 years, 7 months, 7 days
Steven's Estate	6 years

To the second and third causes of action the District Court ruled that a demand was not the basis of the cause of action but was merely a step in the administrative procedure that must be taken within the statutory period of four years.

We quote from the Memorandum Decision of the District Court as it sets forth the argument in a very learned and forcible manner:

* * * "The Statute held applicable to the facts in the San

Pete County case, which this Court must find is applicable to the facts in this case is as follows:

> "Deductions and Refunds. The board of County Commissioners, upon sufficient evidence being produced that the property has been erroneously or illegally assessed, may order the county treasurer to allow the taxes on that part of the property erroneously or illegally assessed to be deducted before payment of taxes. Any taxes, interest and costs paid more than once, or erroneously or illegally collected, may, by order of the board of county commissioners, be refunded by the county treasurer, and the portion of such taxes, interest and costs, paid to the state or any taxing unit, must be refunded to the county, and the proper officer must draw his warrant therefor in favor of the county."

But, from reading the San Pete County case it appears to the Court that the defendant, in the San Pete County case, urged that the theory of the plaintiff's action was a "demand under protest" based on the insufficient allegation of the complaint, reading: "but that said payment was not voluntarily made." (Pg. 563)

And, the Court says:

> Pg. 567. "* * * While it is alleged in the complaint that the taxes in question were 'not voluntarily' paid, yet is it clear from the facts that they were not paid under protest as provided by Section 2684."

The purpose of this contention by the defendant, in the San Pete County case, as it appears to the Court, was to bring the payment under the general rule as announced under "Taxation" in 26 R. C. L. pg. 455, Para. 411, and referred to in many citations submitted by counsel in this case, as follows, namely:

> "In accordance with the general rule governing voluntary payments, a person who voluntarily pays an illegal tax, even though he pays it under considerable actual pressure, cannot maintain an action to recover it back."

We do not, at this time, refer to the cited cases based on this principle because in such cases the rule is applied to statutes peculiar to the state from which the citation comes, which may introduce complications to a clear understanding of this case, as no case cited appears to be under a statute the same as above in which the county can secure a refund as this statute contemplates, which, as, it will be later developed, must be considered.

At this point the case before the Court presents two questions:

> (1) Is a demand on the county commissioners a necessary act giving rise to the cause of action against a county under Section 80-10-17, Revised Statutes of 1933?
>
> (2) When does the statute of limitations begin to run, from the performance of such act, or from the date of payment of the illegal tax?

No doubt the answer to either of these cases will solve the other.

In the San Pete County case the Court's opinion of a four year statute of limitations is based on the holding in the case of Mining Co. v. Juab County, 22 Utah 403.

In the San Pete County case the taxes were paid October 22, 1907, and suit filed to recover on February 27, 1911, which was approximately three years, four months and five days after payment, and, then the Court says:

> Pg. 574. "* * * Whether under section 2642 the action must be commenced within four years from the date the tax is paid or within four years from the date of the demand we do not decide, because this question is not raised nor necessary to the decision of this case."

Apparently a close reading will not reveal a demand in the San Pete County case. In this case the Court speaks of a "demand" and uses this language:

> Pg. 572. "* * * But we need not go, nor do we go, to the extent of holding in this case that taxes coming within the purview of section 2642 may be recovered back without first making a demand therefor upon the county commissioners. We think that the statute implies such a demand from the fact that it authorizes the board of commissioners to order the refunding of the taxes. But we think that it is likewise implied that the statute *does not require more than a demand* after payment, *since it is there clearly implied that the order to refund may be made after the taxes have been apportioned among the several departments of state entitled thereto, and* hence provides that such departments must, in turn, refund to the county their proportion. *It is clearly contemplated, therefore, that no protest is necessary, since* it is assumed that *the refund is not ordered until after apportionment has been made.*"

Because some of the cases treat "claims," "demand" and "protest" as synonymous, it is difficult to keep in mind that "claim," "demand" and "protest" are different words and have different meanings. Each being applicable to a particular statutory regulation.

The word "claim,' is used in Section 19-10-10, Revised Statutes of Utah 1933.

The word "demand" is construed into the Statute by the Court in the San Pete County case.

The word "protest" is used in Section 19-10-11, Revised Statutes of Utah 1933.

The Court, in the San Pete County case, discussed Section 2684 Laws of Utah 1907, now 80-11-11, Revised Statutes 1933, and held that under Section 2642, Laws of 1907, now 80-10-17, Revised Statutes of 1933 that no *"protest"* was necessary, and, as stated before, held that Sections 511, 531 and 533 of the 1907 Statutes, now 19-5-23, and 19-11-10 and 19-11-11, Revised Statutes of 1933 which had to do with *"claims"* were not applicable to the question presented to the Court.

And we find in 14 American Jurisprudence, Title "Counties," Page 228, Par. 65 that:

The word "claim" as ordinarily used in the Statute imparts a matter of charge which is based upon some *statute* or grows out of the performance of some authorized contract.

But the Court in the San Pete County case introduces the word "Demand" and says that Section 2642 of the Laws of 1907, now 80-10-17, as follows:

> Pg. 572. "* * * We think that the statute implies (such) a demand *from the fact that it authorized the board of commissioners to order the refunding of the tax."*

Assuming the statute does so imply a demand. Is such demand the act giving rise to the cause of action? If so, no demand appears to have been made in the San Pete County case.

So the Court in that case did not by example construe a demand as either a condition precedent or the act giving rise to the action.

Consider these illustrations:

ILLUSTRATION I.

In the case of Roxana Petroleum Corp'n v. Bollinger, 54 Fed. Rp. (2nd) pg. 296, it was held:

> "Tax payment cannot be recovered if tax paid voluntarily without protest, because the tax might at once be paid into the State Treasury, and that the State could not, without its consent be sued to recover the tax, and that the director of finance would, of course, not have the money available unless it could be recovered from the sources through which it had been disbursed."

This situation could not arise under Section 80-10-17, Revised Statutes of 1933. Therefore, there is no necessity for a demand either as a condition precedent, or as the act giving rise to the cause of action.

ILLUSTRATION II.

In the case of First Nat. Bank of Scottsboro v. Jackson County, 150 Southern, Pg. 690; in commenting upon the tax set forth in 61 Corpus Juris 1001, and 26 Ruling Case Law 454, the Court states:

> "There the taxes were paid to the collector, under protest, and with written notice that suit would immediately be instituted for its recovery, which was presumably done before any distribution was made."

One of the theories of the demand, claim or protest, is to protect the tax collecting authority before apportionment and distribution of the tax money, which, under the laws of some

States, cannot be readily recovered, or is actually impossible to recover after a certain time. But such condition does not exist in Utah, and, therefore, the necessity for a demand as a condition precedent does not exist, and hence the demand does not give rise to a cause of action under Section 80-10-17 Revised Statutes of 1933.

Compilations may be made showing why a "condition precedent" exists in other jurisdictions, which the illustrations above reflect; including the class of cases holding:

> "Tax payment can not be recovered if the taxpayer paid the tax voluntarily without intention to question or resist the tax to recover it back."

But, in Utah, where a tax is erroneously or illegally collected by a county, under the statute upon which plaintiff's action is predicated, that portion of the tax apportioned among the several departments of the State may be refunded to the county upon the proper officer drawing his warrant therefor in favor of the county.

Another theory for the presentation of a demand, claim or payment under protest is founded upon the propriety of giving the county notice of the claim and an opportunity to pay it without suit. It is designed to protect the board from importunities of passing on claims before they are presented in such a way as to be considered intelligent; and to enable the board to guard against improper charges, and to secure the taxpayers against abuses in the allowance of claims.

The requirements of the law in this respect range from the presentation of a demand by a mere written statement or account giving the nature of the claim and identifying it so as

to bar another action to the presentation, and filing, of a formal and authenticated or verified statement.

We do not doubt that the legislature may prescribe conditions under which a County may be sued. But to hold the Statute under which this action is brought implies a "demand," and then to go further and construe that statute so as to make it a condition under which the County may be sued would in the opinion of this Court be an unwarranted and improper construction.

If a demand is necessary to give rise to a cause of action, there must be some good reason for the making of such demand, and while a demand under the Utah Statute may be implied, as the Court says in the case of Nelson v. San Pete County that holding does not imply that such demand is a necessary act giving rise to a cause of action, but rather is a demand, as pointed out in the San Pete County case by the Court, based upon the theory that the law authorizes the county commissioners to order the refund of the taxes, and is, therefore; founded upon the propriety of giving the county commissioners notice of the claim and an opportunity to pay without suit. No person desires to sue, if payment could be effected on a demand. * * *

* * * Particular reference is made to the text in 37 Corpus Juris, Page 955, under the title "Limitation of Actions," reading as follows:

> "Where, although the cause of action itself has accrued, some preliminary step is required before a resort can be had to the remedy, the condition referring merely to the remedy and not to the right, the cause will be barred if not brought within the statutory

period; therefore the preliminary step must be taken within that period." * * *

It will be noticed in the San Pete County case that the suit was brought within the statutory period of four years, and the court did not find that the "demand" referred to in that decision, as being implied in Section 2642 Laws of 1907, now 80-10-17, Revised Statutes 1933 was the act giving rise to that action.

And a demand which has no such basis cannot be the subject of a claim within the meaning of the law, even though allowed as such, although a demand may be made for certain administrative purposes, as referred to above, such a demand is not required before resort can be had to the remedy.

The demand the court has read into this statute cannot in our opinion possibly be the act giving rise to the cause of action, and its presentation, if necessary, is but part of the procedure for administrative purposes, and to perfect the cause of action, and is not the act giving rise to the cause of action, from which alone the limitation of the statute must be measured. (See White v. King County, 174 Pac. 3)

It was held in the case of Swing v. Barnard-Cope Mfg. Co., etc., 131 N.W. Page 855, as follows:

> "* * * 1. Limitation of Actions—Accrual of Cause—Conditions Precedent—Notice. Where a condition precedent to the right to sue on a cause of action is not a part of the cause of action, but merely a part of or one step in the remedy, it does not delay the running of the statute of limitations." * * *

Therefore, the Court holds that the Statute of Limitations runs from the date of payment." * * * (End of quote.)

If a payment under protest is necessary to recover in these causes of action then surely the plaintiff must lose as to each and every one of them. But if payment under protest is not necessary then most certainly a demand is not necessary for the accrual of the cause of action, but only a preliminary step that is required before resort may be had to the remedy, the condition referring merely to the remedy and not to the right. People v. Cal. Safe Co., et al, 189 P 289, 37 CJ 955. See also: White v. King County (Wash.) 174 P. 3; Neal Young Bond Co. v. Mitchell County (C Tex app) 54 SW 284; Swing v. Barnard-Cope Mfg. Co. (Minn.) 131 NW 855; Baker v. Johnson County, 43 Iowa 645.

We are definitely of the opinion that this court committed itself to the proposition that a demand is not necessary to the accrual of the cause of action a long time ago. Because in Auerbach v. Salt Lake County, 23 U 103, 63 P 907, there is the following headnote:

> "5. Claim against County: Presentment for Payment Before Suit Not Required. There being no statute in this State which expressly prohibits the bringing of an action on a claim against a county before a duly itemized and verified statement has been presented to the board of county commissioners, an objection that the complaint does not allege the presentation and rejection of such a claim, being raised for the first time in this court, can not avail the defendant; such an objection being simply in abatement of the action, to have effect, must be urged by proper plea, or in some other appropriate manner in the trial court, or it will be regarded as waived."

We agree definitely with the lower court that this court did not consider that a demand was necessary for the accrual of the cause of action in the Neilson v. San Pete County case.

And we are forced to admit that we cannot see any similarity in the instant case and Espanda v. Ogden State Bank, 75 U 117. The statute that governs that case, Comp. Laws of Utah, 1917, para. 6478, now R. S. U. 1933, 104-2-24, expressly says there is no limitation against recovery of Bank deposits.

We now come to the case of State Tax Commission v. Spanish Fork—U—100 P 2nd 575, upon which the plaintiff so thoroughly relies. Again we must confess that we utterly fail in being able to follow the plaintiff's logic in maintaining that case is in their favor. To us, if it supports either side it is our side. Both cases are alike in this—they are founded upon a statutory liability.

But they are distinguishable in this—that the Spanish Fork case was controlled by special statutes that made the accrual of the cause of action contingent upon a certain condition. That condition was the filing of a report. And the statute expressly provides a way for the Tax Commission to file the report in case the vendor-taxpayer fails to do so.

The Court held in the Spanish Fork case that it was the filing of the return that started the Statute to run, not the demand. The Court says:

> "To the contention that the Tax Commission by delay in filing a return for the Tax debtor when he failed to file one for himself, may thus postpone the running of the statute, *the ready answer lies that the vendor-taxpayer could have prevented such a result by filing the return.*" (Italics supplied.)

The case definitely holds that the demand was merely a step in or a part of the remedy and not a part of the cause of action. Because the Court figured (Page 576, paragraphs 3

and 4) the time of starting the running of the statute from August 13, 1936, the time of filing the return, instead of September 18, 1936, the date of demand.

Plaintiff's allusion to relief under 104-54-14, R. S. U. 1933, takes one's mind into the realms of fantasy where logic and reason fade into oblivion as completely as the "Lost Tribes of Israel."

Plaintiff's argument that he should be paid because of his bald statement that since Smith v. Carbon County, many counties have voluntarily paid like claims, is met with an equally bald statement, many counties have not, and may we note that the State of Utah has refused to return any money received from inheritance taxes on Union Pacific stock which the U. S. Supreme Court held it had no right to collect, where demand was made for return more than one year after payment.

The Court need not lean over to extend a helping hand to the plaintiff and others in a like position. It was the wealthy estates that paid the large fees. They employed the best counsel and paid liberal fees for their counsel, while the County officers were never picked because of their knowledge of the law. The officers had a right to assume that the Legislature passed valid laws.

We submit that neither the plaintiff nor any other person should be allowed to triumph over the Statute of Limitations either through his laches or his delict. We still are of the opinion that this being a liability created by statute that it is governed by the statute which required the tax to be paid under protest and suit should have been started on the defend-

ant's cause of action within at least one year from the date of the payment.

For the reasons set forth in our briefs we respectfully submit that the trial Court erred in overruling defendant's demurrers to plaintiff's first cause of action and rendering judgment on that cause in favor of the plaintiff. We believe that the plaintiff's first cause of action does not state facts sufficient to justify the relief granted. We further maintain that the trial Court did not err in holding the plaintiff's second and third causes of action were barred by the Statute of Limitations and we submit that this Court should reverse the lower Court's judgment in favor of the plaintiff on the first cause of action and should sustain the lower Court's judgment dismissing plaintiff's second and third causes of action and remand the case with instructions to take appropriate procedure in accordance therewith.

Respectfully submitted,

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